United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

NO. 76-7420

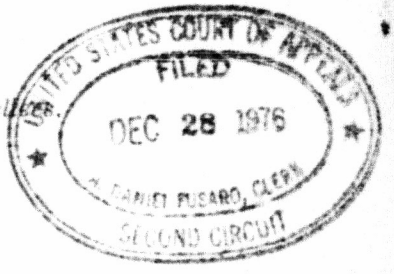
United States Court of Appeals

FOR THE SECOND CIRCUIT

SOLOMON CATES, *et al.*,
Plaintiffs-Appellants,

vs.

TRANS WORLD AIRLINES, INC., *and*
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Defendants-Appellees.



APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLEE
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

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ISSUES PRESENTED

1. Did the District Court exceed its authority by dismissing, for want of jurisdiction under Title VII of the Civil Rights Act of 1964, the claims of three TWA pilots on active or furlough status, who alleged that they suffered hiring discrimination which concluded as to each of them no later than 1969, and sought awards of constructive seniority on the date-of-hire pilot seniority roster, and other equitable relief, as a remedy for the hiring discrimination, but who delayed until 1972 to file charges of discrimination with the EEOC?

2. Did the District Court properly hold that the complaint of hiring discrimination under the Civil Rights Act of 1866, filed in December 1973, was barred by the applicable three-year statute of limitations?*

3. Did the District Court exceed its authority by dismissing for failure to state a claim plaintiff's

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*In order to reduce the scope of material which will be reviewed by the Court, ALPA will not separately brief this issue but calls the Court's attention to the views expressed in the brief of co-defendant TWA.

allegation that defendants breached their duty of fair representation under the Railway Labor Act, by implementing a neutral date-of-hire seniority system?

COUNTER-STATEMENT OF THE CASE

A. Parties.

This case is before the Court upon plaintiffs' appeal from the July 1976 order of the District Court, Hon. Charles L. Brieant, District Judge, dismissing their second amended complaint in its entirety. There are three named plaintiffs. The action is not before the Court as a class action.*

Defendant Air Line Pilots Association, International ("ALPA") is the certified collective bargaining representative under the Railway Labor Act, as amended, 45 U.S.C. §151 et seq. ("RLA") for all flight deck crewmembers (captains, first officers and second officers) employed by defendant Trans World Airlines, Inc. ("TWA"). ALPA is the major pilot-representing organization in the country and represents over thirty thousand flight crew members on nearly every major certificated trunk

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*The District Court ruled on defendants' motions to dismiss prior to ruling on the class action allegations in the second amended complaint "[b]y agreement of the parties." (A.68, n.1). In their brief on appeal (p.2), plaintiffs limit the alleged class to themselves and "the eleven other black pilots in the company's employ."

line and supplemental carrier in the United States.

The second amended complaint alleges that plaintiff James Whitehead, Jr. is a black TWA pilot, who was accepted for hire as a pilot in March 1966, began service in May 1967, after ten years as an Air Force pilot, and has been employed continuously by TWA since 1967. (A.30). Whitehead alleges that he was dissuaded from applying for a TWA flight position earlier than 1966 because of the carrier's "known discriminatory hiring practices." (Ibid.)

Plaintiff Solomon Cates alleges that he applied for a TWA flight position in 1966 and on several subsequent occasions and that he was rejected because of his race until hired by TWA in October 1969. He was furloughed in September 1970 pursuant to the date-of-hire seniority provisions in the TWA-ALPA collective bargaining agreement and has remained on furlough under the same provisions. (A.29,32).

Plaintiff Jonathan George applied for a TWA flight position in 1966, was allegedly rejected on the basis of race, and was hired into a flight crew position in August 1969. He was furloughed on October 5, 1970 and has remained on furlough pursuant to the date-of-hire seniority provisions. (A.30,32).

B. Plaintiffs' EEOC Charges.

Plaintiffs allegedly filed initial charges of discrimination against TWA and ALPA with the Equal Employment Opportunity Commission ("EEOC") on March 24, 1972, amended on June 1, 1972. (A.29-31).

C. Initial Court Proceedings.

The original complaint was filed on December 23, 1973 and was first amended on March 4, 1974.

The first amended complaint alleged that defendants have maintained discriminatory practices, which include "but are not limited to" the allegations that TWA has consistently discriminated in regard to hire of crewmembers on the basis of race, that the pilot seniority system "continues to ...limit, segregate and classify and discriminate against black" TWA employees (A.7), and that TWA has retaliated against persons who have filed EEOC charges. (A.9). Plaintiffs alleged without specification that "ALPA has failed and refused to fairly represent plaintiffs and the class they represent." (A.10).

Following initial proceedings, defendants ALPA and TWA moved to dismiss the complaint on the grounds that plaintiffs' EEOC charges of discrimination were untimely in relation to the alleged discriminatory conduct, and that the complaint was barred by the Statute of Limitations applicable to actions brought within the State of New York under the Civil Rights Act of 1866, 42 U.S.C. §1981. Judge Brieant denied the motions. Although recognizing that the timely filing of EEOC charges under Title VII is a jurisdictional prerequisite to maintenance of a suit under Title VII (A.15), the District Court found that the first amended complaint pleaded not only "a discriminatory refusal to hire and application of the seniority system to the individual plaintiffs," (A.18), but also "a pervasive pattern of racial discrimination which continues to date," including reprisals against persons who filed EEOC charges. The Court found, therefore, that the "complaint is sufficient on its face to make out a continuing violation" capable of tolling the filing period under Title VII. (A.19). The Court further ruled that the three-year statute of limitations applicable under Section 1981 was tolled by the filing of plaintiffs' charge with the EEOC. There was no ruling on plaintiffs' claim of a denial of fair representation.

D. Proceedings on Settlement of Alleged Continuing Violations.

Following the Court's decision against dismissal of the first amended complaint, the parties jointly recognized the usefulness of accomplishing two related goals in this litigation. First was the settlement of plaintiffs' claims that TWA continued to practice discrimination against black pilots. The second goal was to establish a posture in which the Court would determine on a Rule 12(b) motion whether plaintiffs' charges of discrimination were timely filed in the absence of allegations of current discrimination by TWA. (A.42). To accomplish those goals the parties engaged in extended negotiations which led to the Stipulation and Order and Letter of Agreement of December 9, 1975 (A.23-26) and the subsequent filing of the second amended complaint. (A.27 et seq.). The Letter provided that TWA would notify all black TWA pilots that training and check airmen positions were "open in an entirety nondiscriminatory manner" and take other steps in settlement of the claims of ongoing discrimination. In return, in order to expedite the case, plaintiffs agreed to file a second amended complaint to "omit any allegations of current discrimination by TWA against plaintiffs or

the alleged plaintiff class" and "include [in the complaint] that prior alleged discrimination is perpetuated by the seniority provisions of TWA's collective bargaining agreement with ALPA...." (A.26). It was further agreed in the Stipulation that a motion to dismiss the second amended complaint in its entirety would be filed on the grounds that the claims asserted therein were untimely and that a neutral date-of-hire seniority system does not itself violate Title VII. (A.23-24). ALPA was a party to the negotiations but did not execute the Stipulation or Letter because a) plaintiffs represented to ALPA that they asserted against ALPA no claims of current discrimination and b) the settlement relief specified in the Letter related to non-flying or management positions for TWA pilots, requiring no approval by ALPA.

E. The Second Amended Complaint.

Filed on December 15, 1975 (A.27) the second amended complaint is a materially different document from the earlier pleadings. Unlike the first amended complaint, which alleged in paragraph 2 that defendants continued the practice of "segregating and classifying" black pilots and pilot applicants because of race (A.3, ¶2(b)), the second paragraph of the

pleading omits such allegations and specifies that the only actions being complained of were TWA's alleged failure to hire black pilots and applying to those hired the date-of-hire pilot seniority system. (A.27-28). Paragraph 9 of the first amended complaint alleged that the discriminatory practices under complaint were "not limited" (A.7) to those described, but the same paragraph of the second amended complaint alleged that the practices under complaint "are described as follows." (A.32). The second amended complaint, further pursuing plaintiffs' agreement to omit claims of current discrimination, alleges that TWA suspended pilot hiring as of January 1970 "as an economy measure." (A.34, ¶f.). The earlier pleading indicated that matters related to promotion and compensation of pilots contained elements of carrier discretion (A.8 ¶(d)), but the second amended complaint alleges that the pilot date-of-hire seniority system controls "[a]ll matters regarding compensation, terms, conditions and privileges of employment." (A.32).

The District Court, summarizing the material allegations of the second amended complaint in light of prior

proceedings, found,

> "Reading the Second Amended Complaint together with the Stipulation and Letter of Agreement, it is clear that plaintiffs are alleging two distinct unlawful employment practices: (1) a refusal to hire plaintiffs and the class they seek to represent because of race ('the refusal to hire claim') and (2) the application of a facially neutral date-of-hire seniority system to all flight deck crew members, including plaintiffs and all other similarly situated Black flight deck crew members, which, by making Blacks more exposed to layoffs than whites, has the effect of carrying forward TWA's past discriminatory hiring practices, now abandoned, into the present (the 'seniority claim'). (A.43-44).

F. Dismissal of the Second Amended Complaint.

As contemplated by the Letter of Agreement, defendants moved to dismiss the second amended complaint. The Court granted the motions (A.36), finding that plaintiffs' EEOC charges of discrimination were untimely under Section 706(e) of Title VII, 42 U.S.C. §2000e-5(e), that their complaint under the Civil Rights Act of 1866, 42 U.S.C. §1981, was barred by the applicable three-year statute of limitations, and that the complaint, "[e]ven when read in the light most favorable to plaintiffs" (A.65), did not state a claim against

ALPA or TWA for breach of the duty of fa[illegible] representation under the Railway Labor Act.*

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*The question of RLA violations was not briefed by plaintiffs or defendants in the District Court. As indicated in the Stipulation and Letter of Agreement (A.23-26), the parties contemplated that a motion could be filed which could terminate the entire complaint strictly by addressing itself to the Title VII and Section 1981 claims, and that the RLA claims would fall away if the other claims were dismissed. In the District Court plaintiffs did not contend that defendants' 12(b)(6) motion with regard to Title VII and Section 1981 was insufficient because it was not addressed to the RLA claims. Even in the Civil Appeal Pre-Argument Statement filed August 30, 1976 the only issue which plaintiffs proposed to raise on appeal was "[w]hether the plaintiffs' administrative changes to the [EEOC] were filed in a timely manner."

ARGUMENT

I.

PLAINTIFFS WAITED BETWEEN TWO AND ONE-HALF AND SIX YEARS TO FILE EEOC CHARGES WITH RESPECT TO TWA's ALLEGED HIRING DISCRIMINATION; THEIR CLAIMS UNDER TITLE VII ARE TIME-BARRED.

A. Nature of the Allegations of the Second Amended Complaint.

This case is in a sense unusual because the proceedings below were carefully developed by all parties, with the Court's approval, in order to frame the precise issue of the timeliness of plaintiffs' EEOC charges which were considered in the District Court's decision. The parties recognized that the issues had not been dealt with in this Circuit in any case which was not complicated by other factors such as allegations of "continuing" violations or of ongoing discrimination against a certified class. Plaintiffs were just as intent as defendants upon avoiding a complicated trial if one was unnecessary, narrowing the complaint to the point where the Court could rule on a 12(b)(6) motion whether plaintiffs' EEOC charges were timely filed. Thus, the parties entered into negotiations which directly led to a significant narrowing of the complaint so

that the issues could be presented for resolution as a matter of law at this time. As narrowed and sharpened, the complaint has now resolved itself into two claims on behalf of the named plaintiffs: that each of the three plaintiffs was discriminated against on the basis of race with respect to hire, and that each of the named plaintiffs occupies a wrongful place on the TWA pilot seniority roster because of the hiring discrimination and therefore continue to suffer the effects of their wrongfully delayed hire by TWA. Thus, plaintiffs do not allege in the second amended complaint that the seniority provisions unlawfully "segregate" or "classify" them, nor do they allege that the seniority provisions were designed or invoked with the intent of preventing their promotion or continued employment on the basis of race.

Thus conceived, the second amended complaint clearly provokes the issues which the parties intended to develop for resolution of the Court: whether plaintiffs timely filed their EEOC charges with respect to TWA's alleged hiring discrimination or the effects of plaintiffs' occupation of an alleged "wrongful place" on the pilot seniority list.

In connection with those issues, many of the "facts" suggested by plaintiffs in their brief on appeal are irrelevant and serve only to obscure the issues which the parties had intended to illuminate. For example, plaintiffs' allegation (br., p.4) that TWA discriminates against black pilot applicants at the present time is immaterial to plaintiffs' cause on a Rule 12(b)(6) motion, in light of the agreement to omit claims of current discrimination, which found expression in the allegation that TWA suspended pilot hiring in 1970 (A.34).

In short, plaintiffs agreed below that this case would be treated as one where the plaintiffs are complaining of hiring discrimination as applied to them, and of the resulting impact of a neutral date-of-hire seniority system on their job benefits, competitive bidding, and furlough rights. This is <u>not</u> a case where plaintiffs complain of continued policies of discrimination by TWA or ALPA in hiring or any other condition of employment. Moreover, this is not a case where plaintiffs suggest that they were unaware of the significance of seniority assignment to day-to-day functioning from the moment they commenced service with

TWA, but on the contrary they allege that "[a]ll matters" regarding pilot terms and conditions of employment are controlled by the date-of-hire seniority system. (A.32).

Thus narrowed, this case squarely presents the issue whether plaintiffs were required to file their EEOC charges of discrimination within the statutory period following the last date upon which they allegedly suffered hiring discrimination or were instead entitled to wait until at their own discretion the grievances which they allegedly suffered under th[e] seniority provision became sufficiently cumulative to justify filing their EEOC charges.

We think, contrary to plaintiffs, that Title VII was not devised as a license to file charges without limitation of time, and that the second amended complaint was therefore rightfully dismissed.

B. <u>The Title VII Filing Period.</u>

Title VII was a hard fought but well-won piece of legislation, and one of the industry fears which the sponsors were required to overcome was that of a continuing stream of

claims based on events many months or even years in the past. To secure passage of the legislation, the proponents accepted the incorporation of rigorous administrative procedures which were obviously designed quite consciously to cut off claims that were not presented within a relatively short time after the transactions or events which yielded the grievances.

One example of Title VII's strict filing requirements is Section 706(f)(1), 42 U.S.C. 2000e-5(f)(1), which provides in part:

> "If a charge filed with the Commission...is dismissed by the Commission...the Commission...shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge...by the person claiming to be aggrieved..."

In DeMatteis v. Eastman Kodak Co., 511 F.2d 306 (2d Cir. 1975), this Court dismissed the complaint of an aggrieved person who did not bring suit within 90 days after notice of dismissal, stating, "The commencement of the action within the applicable 90-day statutory limitation is a

jurisdictional fact." 511 F.2d at 309. The Court held that the 90-day period begins to run from receipt of the EEOC's letter of determination and dismissal and not from receipt of an administrative right to sue letter authorized under EEOC Regulations. Supporting this analysis, the Court noted, "'The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation,'" adding:

> "The effect of a contrary holding would be that in all subsection (b) cases of dismissal by the Commission, after investigation and a determination that there is not reasonable cause to believe that the charge is true (which constitutes a complete and final disposition of the case by the Commission), followed by the required prompt notice to the aggrieved, the 90-day statute of limitations running from the date of the notice could be extended indefinitely until the aggrieved, weeks or months later, asked the Commission to issue to him a second or "Right to Sue" notice, to start another 90-day limitation period running. The Commission has no such regulatory power." 511 F.2d at 311.

The other critical filing requirement under Title VII of course is the set of time limits posited for filing the initial charge of discrimination with the EEOC or state

agency, is applicable. Original Section 706(d) of Title VII, 42 U.S.C. §2000e-5(d), which was the filing provision in effect when the alleged discriminatory refusals to hire in this case occurred, required that a charge of discrimination be filed within 90 days "after the alleged unlawful employment practice occurred" where, as here, no charges were filed with the New York State Human Rights Division. On March 24, 1972, the same date as plaintiffs filed their charges with the EEOC, Section 706(d) was renumbered as Section 706(e), 42 U.S.C. §2000e-5(e) and amended to extend the time limit from 90 to 180 days.

In Weise v. Syracuse University, 522 F.2d 397, 412 (2d Cir. 1975), this Court held that "compliance with these requirements is a jurisdictional prerequisite to maintenance of a civil action," citing DeMatteis v. Eastman Kodak Co., supra, 511 F.2d at 309, and Choate v. Caterpillar Tractor Co., 402 F.2d 357, 359 (7th Cir. 1968).* See also McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798 (1973).

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*In Weise this Court held that plaintiff Weise's second charge of discrimination was timely because it was filed within 300 days after the alleged discriminatory refusal to hire - which was not the case with the plaintiffs here.

Although in reliance on Love v. Pullman Co., 404 U.S. 522 (1972), the Court added that "the rigid insistence on meticulous observance of technicalities unrelated to any substantive purpose is inappropriate," 522 F.2d at 412, Love clearly indicated the substantive purpose of Title VII's short filing period was

> "to ensure expedition in the filing and handling of those complaints [of discrimination]." 404 U.S. at 526.

C. Plaintiffs Failed to File Their Charges of Discrimination Within 180 Days After the Alleged Unlawful Employment Practice Occurred.

The material alleged unlawful employment practices which are the subject of the second amended complaint were TWA's alleged refusal to hire the plaintiffs Cates and George, and alleged unlawful discouragement of an employment application by Whitehead. They very latest dates that any of these actions could have occurred were the dates plaintiffs were respectively hired: March 28, 1966 in the case of Whitehead; August 1, 1969 for George; and October 17, 1969 for Cates.

It is settled law that, ordinarily, a refusal to hire is not a continuing violation. Molybdenum Corp. v.

EEOC, 457 F.2d 935 (10th Cir. 1972); Jurinko v. Edwin L. Wiegand Co., 477 F.2d 1038 (3d Cir. 1973), judgment vacated on other grounds, 414 U.S. 970 (1974). Other courts have taken the same view regarding assignment of seniority positions [Kennedy v. Braniff Airways, Inc., 403 F.Supp. 707, 709-10 (N.D. Tex. 1975); Williams v. Norfolk & W.Ry.Co., ____ F.Supp. ____, 7 CCH EPD ¶9399 (W.D.Va. 1974)]; denial of a promotion [Culpepper v. Reynolds Metals Co., 296 F.Supp. 1232 (N.D. Ga. 1968), rev'd on other grounds, 421 F.2d 888 (5th Cir. 1970); Moore v. Sunbeam Corp., 459 F.2d 811, 828 (7th Cir. 1972)]; discontinuance of a job assignment [Hutchings v. United States Industries, Inc., 309 F.Supp. 691 (E.D. Tex. 1969), rev'd on other grounds, 428 F.2d 303 (5th Cir. 1970)]; transfers [Younger v. Glamorgan Pipe and Foundry Co., 310 F.Supp. 195]; and discharges [Collins v. United Air Lines, Inc., 514 F.2d 594 (9th Cir. 1975); Greene v. Carter Carburetor Co., ____ F.2d ____, 12 FEP Cases 1263 (8th Cir. 1976); Hecht v. Cooperative for American Relief Everywhere, Inc., 351 F.Supp. 305, 310 (S.D.N.Y. 1972)].

Insofar as the alleged refusal to hire each individual plaintiff could be construed to be a continuing violation as to hiring, the violation was discontinued at the time each plaintiff was actually hired. At

least, plaintiffs were required to file any EEOC charges with respect to such refusals to hire and any consequences which flowed from them within 180 days from the date of hire itself. But plaintiffs filed their original charges of discrimination with the EEOC no earlier than March 24, 1972. In the case of Whitehead, this was 2,182 days after the alleged hiring discrimination was completed. In the case of George, the filing occurred 958 days after he was hired.* In the case of Cates, the filing occurred 890 days after he was hired. Thus plaintiffs did not meet the Title VII filing requirements, and the District Court therefore properly ruled that it lacked jurisdiction to adjudicate the alleged acts of discrimination.

D. Plaintiffs' Receipt of Date-of-Hire Seniority Positions Pursuant to the Neutral Pilot Seniority Provisions Did Not Toll the Title VII Filing Period.

Each of the three plaintiffs contends that he would occupy a higher position on the TWA pilots system seniority list but for the hiring discrimination practiced against

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*George actually alleges only the single refusal to hire him on February 28, 1966, rather than a continuing refusal. (A.30).

him by TWA, and that the detriments thereby suffered convert the hiring discrimination into continuing violations as to which there is an indefinite, open-ended and technically infinite period for filing EEOC charges under Title VII. Indeed, in the words of their brief (p.15), it is plaintiffs' position that the 300 day filing limit under Title VII is actually "inapplicable" to their claims of discrimination in this case.* Put another way, it is apparently plaintiffs' position that they may complain of TWA's alleged hiring discrimination years after the discriminatory actions because, as pilots on the seniority list, they continue to suffer employment discrimination resulting from their seniority positions, although the claims of persons who may allege even earlier hiring discrimination by TWA but who were never

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*The EEOC suggests that the time limitation on plaintiffs' action under Title VII may be found in the doctrine of laches. (Brief for the EEOC, p.24). It is difficult to understand that this position advances plaintiffs' cause, as there is no apparent excuse for highly trained pilots to wait three to six years before filing charges that they were discriminated against in the hiring process, or to wait one and a half years before complaining of an alleged discrimination in furloughs. Moreover, the entire Title VII remedial scheme is founded in equity, and the statutory filing period represents the Congressional judgment of the equitable balance between appropriate delay and prompt resolution of claims of discrimination. cf. Jones v. Trans World Airlines, Inc., 495 F.2d 790, 799 (2d Cir. 1974).

hired by the carrier are time-barred because they never received any seniority positions.*

Although plaintiffs have phrased their claims in terms of the "continuing effect" of TWA's alleged hiring discrimination against them (br.p.16, ll.9-10), they admit that defendants are not practicing any current discrimination against them. They likewise admit as found by the District Court, that they do not challenge the existence of the TWA pilot seniority system but only seek "an award of constructive seniority dates reflecting their rightful place in [the] seniority system as well as other equitable relief." (Br., p.15). In short, plaintiffs requested the District Court to provide a remedy for alleged hiring discrimination, in the form of backpay and "rightful place" seniority, in the same manner as applicants for employment who were not hired and received no seniority date at all. Yet plaintiffs have never adequately explained why persons who were hired by TWA are entitled to wait for years after suffering alleged

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*This was stated quite sharply in the EEOC brief (p.12): "Such claims have ordinarly been held barred only in circumstances where it seemed clear that a plaintiff could not have established that the system in fact perpetuated past discrimination against them, or where the plaintiffs were no longer subject to the system." (footnote omitted).

hiring discrimination before filing EEOC charges when the claims of those who were not hired were long ago cut off by the running of the Title VII jurisdictional filing period.

In two recent and well-known decisions, the Supreme Court clarified the potential availability of backpay and constructive seniority awards as equitable remedies for proven victims of hiring discrimination proscribed by Title VII. Albemarle Paper Co. v. Moody, 95 S.Ct. 2362 (1975); Franks v. Bowman Transportation Co., 96 S.Ct. 1251 (1976). Despite the obvious significance of Franks, the brief for the EEOC inexplicably ignored the Supreme Court's Franks opinion and erroneously intimated that the Fifth Circuit decision was the final action in the case. (Br., p.24). Whatever the reason for this action, it is apparent that both Albemarle and Franks have fatally undercut plaintiffs' contention that the Title VII filing period is inapplicable to their claims of discrimination in this case.

In Albemarle Paper Co., supra, the Court held that backpay is a potential remedy for unlawful discrimination under Title VII "that should be denied only for reasons which, if applied generally, would not frustrate the central

statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." 95 S.Ct. at 2373 (footnote omitted). The Court further held that circumstances may exist which excused the District Courts from awarding backpay to particular plaintiffs under Title VII. 95 S.Ct. at 2374-75. Implicit throughout the Court's treatment of backpay was its recognition that backpay is a remedy for employment discrimination, and that an employer's continued denial of such a remedy to a victim of hiring discrimination is not itself an act of discrimination for analytic purposes under Title VII. Under the analytic scheme adopted in Albemarle, there could be no claim that an employee whose weekly paycheck is lower than it would have been if he were not the victim of earlier hiring discrimination may allege each paycheck as a fresh act of discrimination for purposes of the Title VII filing period. Clearly such an employee must complain of the hiring discrimination within the applicable statutory period after the discrimination occurs.

Franks v. Bowman Transportation Co. completes the analytic process undertaken in Albemarle and applies it to the issue of constructive seniority relief.

The type of case to which the analysis is applied was defined by the Court in terms which describe the context of the present case, as recognized by the District Court (A. 53):

> "The underlying legal wrong affecting [the Black applicant] is not the alleged operation of a racially discriminatory seniority system but of a racially discriminatory hiring system. Petitioners do not ask modification or elimination of the existing seniority system, but only an award of the seniority status they would have individually enjoyed under the present system but for the illegal discriminatory refusal to hire." 96 S.Ct. at 1251.

The Court held that in this type of case an award of constructive seniority is a potential remedy for proven victims of hiring discrimination, notwithstanding the terms of the seniority-protection clause of Title VII, Section 703(h).*

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*Section 703(h) provides in part:

> "Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system...provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin."

But constructive seniority, like backpay, in this type of case is no more than a remedy, and the application of a neutral date-of-hire seniority system to victims of hiring discrimination is not itself an actionable wrong under the Franks analysis.

Thus, the award of constructive seniority to victims of hiring discrimination under the Franks analysis draws its authority solely from the remedial clause of Title VII, Section 706(g).* Throughout the majority opinion, the Court describes the seniority issue in this type of case wholly in terms of relief

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*Section 706(g) provides in part:

> "If the court finds that the respondent has intentionally engaged in or its intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay...or any other equitable relief as the court deems appropriate."

and remedy, analytically on the same footing as backpay. The Court further holds that an award of seniority status is not "requisite in all circumstances," 96 S.Ct. at 1267, and that such an award is never available unless "an illegal discriminatory practice occurring after the effective date of the Act is proved - as in the instant case, a discriminatory refusal to hire." 96 S.Ct. at 1263 (emphasis supplied). Contrary to plaintiffs' exposition, it is clear that the Franks case did not hold that it is "the continuing effect, existing at the present time and carrying forward into the future, that was itself actionable under Title VII." (Pl. Br., p. 16).

Thus seniority adjustments like backpay are only available in this type of case as a possible remedy for the hiring discrimination allegedly suffered by the plaintiffs, and not as the basis for discarding the Title VII filing period with respect to the discrimination under complaint. As stated in Collins v. United Airlines, Inc., 514 F.2d 594, 596 (9th Cir. 1975),

> "Under the statute, it is the alleged unlawful act or practice -

> not merely its effects - which must have occurred within the 90 days preceding the filing of charges before the EEOC. Were we to hold otherwise, we would undermine the significance of the Congressionally mandated 90-day limitation period." (footnote omitted).

See also cases cited supra, p. , reflecting that the effects of discriminatory actions do not convert those actions into continuing violations.

Every effect of TWA's alleged hiring discrimination which is the subject of the second amended complaint is the inexorable consequence of plaintiffs' date-of-hire positions on the pilot seniority list - positions that were assigned and received in a non-discriminatory manner years before plaintiffs filed any charges of discrimination with the EEOC. Plaintiffs have omitted from their pleading any claims of current discrimination as practiced against them. They admit that they seek "an award of constructive seniority dates reflecting their rightful place in TWA's seniority system" in relation to TWA's alleged discrimination in hiring them. (Br., p. 15). To expand the Court's jurisdiction so as to invite charges

of hiring discrimination any time after the aggrieved person was hired would eliminate the jurisdictional limitation embodied in the filing restriction. Plaintiffs could treat each diminished paycheck, each undesirable trip awarded by seniority bidding, each unwanted vacation date, each failure of upgrading and each furlough as freak acts of discrimination ad infinitum. This Title VII does not permit.

Decisions under the LMRA. This analysis of Title VII is confirmed by leading decisions construing the remedial and limitations provisions of the Labor Management Relations Act, 29 U.S.C. §151 et seq. ("LMRA"), in particular Sections 10(a), 10(b) and 10(c) of that statute, 29 U.S.C. §160(a)-(c).* Under the LMRA the

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*In relevant part, Sections 10(a), (b) and (c) provide:

> "10(a). The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. *
>
> (b) *** Provided, that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is

cont.../

NLRB and Courts have considered the precise issue which is raised by the second amended complaint: whether an employee who claims that his particular receipt of a seniority position in a facially neutral date-of-hire system resulted from discrimination within the statutory meaning* must file within the Section 10(b) six-month

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(footnote continued)

made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the date of his discharge. ***

(c) If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act."

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*Section 8(a)(3), 29 U.S.C. §158(a)(3) provides in part:

"It shall be an unfair labor practice for an employer - *** (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

period following the discriminatory action. The issue was resolved more than twenty years ago, against the position of plaintiffs in this case, in Bowen Products Corp., 113 NLRB 731 (1955). As described by Mr. Justice Harlan in Local Lodge No. 1424 v. NLRB, 362 U.S. 411, 420, n. 12 (1960), the facts in Bowen Products were these:

> "In Bowen Products an employee recalled from layoff was discriminatorily placed at the bottom of the relevant seniority list. He unsuccessfully attempted to obtain his proper seniority rating, and several months later was included in an economic reduction in force. Had his seniority originally been properly computed, he would not have been laid off at that time. The charge was filed and served within six months of the layoff, but more than six months after the original determination of seniority status. Finding that the only basis for a holding of unlawful layoff would be a finding that that determination had been a violation of the Act, the Board dismissed the complaint."

Under those circumstances, similar in material respects to the allegations of the second amended complaint, the Board dismissed the action since, in the words of Justice Harlan, "the gravamen of the unfair labor practice complained of lay in a fact or event occurring during the barred period." 362 U.S. at 420. As the

Board explained,

> "The placement of Seals at the bottom of the seniority roster on August 24, notwithstanding his prior service, was a fully consummated act at that time, which immediately created an adverse substantive condition of employment. Thus, assuming such action to be unlawfully motivated, Seals knowingly then sustained an immediate injury under the Act which could have been remedied had he filed charges within the statutory 6-month period of limitation. To regard such an injury as a continuing unfair labor practice, because an otherwise proper layoff subsequently resulted therefrom, would in effect render Section 10(b) meaningless. For under this theory, 10, 20, or more years after the original discrimination, the complainant, upon being otherwise properly denied a promotion, transfer, recall, vacation benefits, or other rights based on seniority, could maintain an action therefor by establishing the original discrimination and relating the subsequent action to it." 113 NLRB at 732 (footnote omitted).

The Bowen Products principles were adopted in Local Lodge No. 1424 v. NLRB, supra, and continue to govern the application of Section 10(b).*

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*E.g., Indian Head Hosiery Co., Inc., 199 NLRB 488 (1972) and the following Administrative Rulings of the NLRB General Counsel: Case F-834, 44 LRRM 1020 (1959); Case F-787, 43 LRRM 1492 (1958) (charges dismissed where they

cont.../

Under these principles, plaintiffs' failure to file administrative charges within the statutory period following the alleged hiring discrimination would bar their action for relief, notwithstanding the later-occurring effects of their receipt of date-of-hire seniority.

The construction of LMRA Section 10(b) is properly applicable to Section 706(e) of Title VII. The remedial purposes of the two statutes occupy the same high plane. The remedial provisions of Title VII were "expressly modeled" on Section 10(c) of the LMRA. Albemarle Paper Co. v. Moody, supra, 95 S.Ct. at 2372, 2374, n. 16; Franks v. Bowman Transportation Co., supra, 96 S.Ct. at 1266; Acha v. Beame, 531 F.2d 648, 655 (2d

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"filed more than six months after employee's name was placed at bottom of [seniority] list; and Case K-557, 38 LRRM 1189 (1956) ("General Counsel refuses to issue complaint based upon charge filed by individual alleging that a company and a union collaborated to deprive him of his seniority in violation of Sections 8(a)(1) and (3) and 8(b)(2). Shortly after his return to the bargaining unit from which he had been absent several years, the employee was placed at the bottom of the seniority roster. The charge was filed eleven months later. Further proceedings are barred by Section 10(b) of the Act... Bowen Products, 113 NLRB No. 63").

Cir. 1976). Adhering in Title VII cases to the construction placed upon Section 10(b) by the Supreme Court is integral to the harmony of the two statutes. As stated in Franks,

> "[T]he pertinent point is that in utilizing the NLRB as the remedial model for Title VII, reference must be made to actual operation and experience as it was evolved in administering the Act." 96 S.Ct. at 1269, n. 34.

Under the Board's "actual operation and experience," as affirmed by the Supreme Court, plaintiffs' complaint under Title VII is time barred.

E. The Furloughs of Cates and George Did Not "Renew" TWA's Alleged Hiring Discrimination or Toll The Title VII Filing Period.

Relying on Franks and Collins the District Court held with respect to the claims of plaintiff Whitehead,

> "The monthly allocation of seniority benefits pursuant to a facially neutral, date-of-hire seniority system is not the event by which an unlawful employment practice occurs for the purposes of triggering the 180 day limitations period in which to file charges. Any detriments which he may have suffered during this period are not in and of themselves fresh acts of discrimination, but are only the derivative effects

> of the prior policies as carried forward by the seniority system. As a case like Collins makes clear, it is the unlawful act or practice and not merely its effects which must occur within the 180 day period prior to the filing of charges with the EEOC." (A. 61).

The District Court did not apply the same reasoning to the complaints of Cates and George, but held that their furloughs in 1970 pursuant to the same seniority provisions which govern Whitehead's employment conditions constituted fresh discriminatory acts which reinstated the Title VII filing period. (A. 46).

There is no apparent reason why the reasoning which applied to the Whitehead's claim is not equally applicable to Cates and George. As recognized in the Bowen Products analysis, their furloughs were merely automatic effects of the date-of-hire seniority provisions, in this respect identical to the competitive and benefit seniority effects experienced by Whitehead and other pilots on the job.

As found by the District Court, "[a]n award of constructive seniority... affects the rights of other workers." (A. 57). The Court added, in understatement:

> "All employees have an interest in knowing precisely where they stand on the seniority roster, because seniority benefits are worthless unless secure. An evaluation of his relative seniority is an important factor in the daily life of a worker." (A. 57).

Based on these considerations the Court correctly ruled,

> "[T]hose who seek to rearrange the seniority lists should be encouraged to bring their actions promptly." (A. 58).

In light of this conclusion, the Court should not have ruled that Cates and George were entitled to wait until their furloughs to complain of TWA's alleged hiring discrimination; like Whitehead, they should have filed their claims "promptly," i.e., no later than 180 days after they were hired. Otherwise, under the District Court's rule, an employee could wait years after the alleged discrimination before filing charges. During this time, other employees' seniority expectations accrue in oblivion of the plaintiff's unperfected claim of discrimination.

A furlough can be the "most severe" effect of low seniority status. (A. 56). But plaintiffs

themselves allege that "[a]ll matters regarding compensation, terms, conditions and privileges of employment..." are controlled by pilot seniority (A. 32; emphasis added), and that "[a]ll of TWA's black flight deck personnel have been and are currently adversely affected by denial of promotion and by furlough" in consequence of the seniority system. (A. 33). Pilots on many carriers subject to seasonal business swings experience frequent periodic layoffs. Thus there is no absolute rule which suggests that furloughs are necessarily a more severe effect of the seniority provisions than, say, rights to bid on heavier aircraft.

To support their view that the furloughs of Cates and George were a form of continuing discrimination, plaintiffs rely on Acha v. Beame, supra, 531 F.2d 648 (2d Cir. 1976), and United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971). Looking first at Acha, it is apparent that plaintiffs' interpretation is over-broad. Anticipating Franks v. Bowman Transportation Co., supra, Acha held only that an award of constructive seniority "to those who had actually been discriminated against... is... a remedial device well within the broad

power conferred on the district court by section 706(g)." 531 F.2d at 656. There is no incompatibility between this holding and the rule that the Title VII filing period commences upon occurrence of the discriminatory act for which the remedy is sought.*

Plaintiffs apparently do not rely on the holding in Acha but on aspects of the Court's discussion which seemingly suggest to plaintiffs that non-discriminatory furloughs of victims of earlier hiring discrimination are renewed violations of the Act. See 531 F.2d at 654.

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*On remand in Acha, the District Court declined to dismiss the complaint as time-barred, in reliance on Evans v. United Air Lines, Inc., 534 F.2d 1247 (7th Cir. 1976) (on rehearing). Acha v. Beame, 13 FEP 16 (S.D.N.Y. 1976). The Supreme Court has granted United's petition for certiorari in Evans, 45 USLW 3321 (No. 76-333). The difficulty in the Evans decision on rehearing is the same as the difficulty in plaintiffs' position here: Evans was found to possess a timely claim of prior discrimination merely because United rehired her, whereas the same claim of the person who was not rehired is cut off by the statute of limitations. This curious result could eliminate settlement of some types of Title VII cases.

Plaintiffs' view of Acha does not support reversal of the District Court, because assuming that the 1970 furloughs did "renew" prior discrimination, plaintiffs should not have waited until 1972 to file their charges. In any event, the language in Acha to which plaintiffs point apparently reflected a method of analysis which the later decision in Franks made obsolete. Although Acha foreshadowed the result in Franks, the paths by which the two Courts reached similar results were not the same. In Acha, this Court viewed the issue of constructive seniority for victims of hiring discrimination in terms of whether the "use" of a neutral date-of-hire seniority system to accomplish reductions in force "violated" Title VII. 531 F.2d at 651. Under the Court's view, this form of stating the issue appeared necessary because the Court was concerned that constructive seniority awards were barred by Section 703(h) unless the date-of-hire seniority provisions "lose the protection of being 'bona fide'", as would be the case where the furloughs were violative of the Act as being "based on ... discrimination." 531 F.2d at 654.

Subsequent to Acha, the Court in Franks indicated that the issue in this type of case was not whether the "use" of a neutral seniority system to accomplish furloughs "violates" Title VII, but whether constructive seniority may be awarded to victims of hiring discrimination as a remedy. The Court held that Section 706(g) authorizes this type of remedy even where the seniority provisions are patently bona fide and not the result of an intent to discriminate. Thus, under the Franks analysis, which supersedes Acha, the use of a bona fide seniority system to accomplish furloughs is not a discriminatory act.*

United States v. Bethlehem Steel Corp., supra, 446 F.2d 652, relied on by plaintiffs (Br., p. 17), was also a case which involved very different considerations from the present litigation. Of course in Bethlehem, suit was brought by the Attorney General and issues of

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*Chance v. Board of Examiners, 534 F.2d 993, 1007 (2d Cir. 1976) (on rehearing) likewise indicated that constructive seniority may be awarded in certain circumstances as a remedy for proven hiring discrimination. Chance of course was decided under Section 1981 and did not consider Title VII timeliness issues.

timeliness under the Title VII filing requirements were not raised. But Bethlehem, unlike Franks and unlike the present case, involved an attack on discriminatory job retention requirements in which blacks who were discriminatorily assigned to low paying, undesirable departments were locked into those departments by rules which required them to forfeit accrued seniority rights and pay levels if they transferred to other departments. 446 F.2d at 656. This system actually prevented black employees from ever reaching the level of white employees hired at the same time. Rather than constituting a bona fide seniority system, the provisions at issue were a discriminatory seniority forfeiture system. By actively pursuing these policies, the defendants were subject to charges of continuing discrimination against black employees. Under these circumstances, the Court ordered extremely limited relief in the form of allowing discriminatees to fill vacancies in more desirable departments without loss of accrued seniority or reduction in pay. In contrast, plaintiffs here do not challenge the maintenance of the pilot seniority system but seek higher positions in the system as a remedy for alleged prior discrimination.

The furloughs of Cates and George were not "continuing" discrimination. The claims of Cates and George were properly dismissed even if their furloughs were fresh acts of discrimination as claimed by plaintiffs. Both Cates and George waited approximately a year and a half after the furloughs to file charges. As the District Court held, "it is not unreasonable to demand that a victim of past... discrimination take steps to protect his or her rights" within one-half year after suffering these furloughs.

As stated in Kennedy v. Braniff Airways, Inc., supra, 403 F.Supp. at 709, "Virtually any violation may be construed as a continuing one." But the issue raised by plaintiffs' claim that the furloughs were fresh acts of discrimination is why the furloughs should be construed as continuing violations from 1970 to the present.

In Griffin v. Pacific Maritime Ass'n., 478 F.2d 1118, 1120 (9th Cir. 1973), the Court stated,

> "A layoff, by itself,... is not such a continuing act."

The Courts have also frequently held that an alleged wrongful discharge is a completed act which commences

the Title VII filing period. Collins v. United Air Lines, Inc., supra, 514 F.2d 594; Hecht v. CARE, Inc., 351 F.Supp. 305, 310 (S.D.N.Y. 1972); Burney v. North American Rockwell Corp., 302 F.Supp. 86, 92 (C.D.Cal. 1969). There is no reason to distinguish between a discharge and layoff for purposes of the filing period; in either instance the act itself has occurred and the employee is on notice. But there is good reason as found by the District Court (A. 56-58), to require employees allegedly aggrieved by a furlough to file charges within 180 days after the furlough takes place. Both the policies of the Title VII filing period and the requirement of equity to other pilots whose seniority expectations accrue in oblivion of the furloughed pilot's unperfected claim of discrimination, demand that charges be promptly filed. In this respect plaintiffs' claims are again time-barred. See, in addition to cases previously cited, pp. , supra, Turnow v. Eastern Airlines, Inc., _____ F.Supp. _____, 13 FEP Cases 1227, 1229 (D.N.J. 1976) (following decision of the District Court in the case sub judice). If the furloughs were renewed discrimination under Title VII, plaintiffs' claims are nonetheless time-barred.

II.

THE DISTRICT COURT PROPERLY DISMISSED PLAINTIFFS' CLAIMS THAT DEFENDANTS BREACHED THE DUTY OF FAIR REPRESENTATION.

Plaintiffs alleged that defendants "failed in their duty of fair representation" by establishing a date-of-hire pilot seniority system and failing to modify the system "in order to lessen or remove the adverse impact which the seniority system ... has upon black flight deck personnel." (A. 34). Apparently, plaintiffs claim that these alleged actions were violations of the Railway Labor Act. (Id.).

Initially, it is apparent that the Court should not reach the issues raised in plaintiffs' brief (pp. 29 et seq.) regarding denial of fair representation. Plaintiffs and defendants evidently contemplated that those issues would not preclude dismissal of the entire complaint on grounds that the claims under Title VII and Section 1981 were time-barred. The Letter of Agreement and Stipulation and Order filed in the District Court as the predicate for the second amended complaint indicate that the timeliness issues were the plaintiffs' only concern; this was further confirmed in the plaintiffs' Civil Appeal Pre-Argument Statement,

which stated that the issue proposed to be raised on appeal was "[w]hether the plaintiffs' administrative charges to the [EEOC] were filed in a timely manner." Moreover, in their brief to the District Court, plaintiffs did not even discuss their fair representation claims, let alone raise those claims as a bar to dismissal of the complaint. Plaintiffs in the District Court agreed to omit claims of current discrimination from this litigation. They evidently waived the fair representation claims and should be held to their waiver at this time.

Examining plaintiffs' fair representation claims, it is apparent that those claims were advisedly omitted from the proceedings below as being totally without merit. In this litigation, as in Franks v. Bowman Transportation Co., supra, 96 S.Ct. at 1261, plaintiffs do not in fact "ask modification or elimination of the existing seniority system, but only an award of the seniority status they would have individually enjoyed under the present system but for" TWA's alleged illegal discriminatory refusal to hire them. They do not claim that the pilot seniority systems are the result of an intent to discriminate. They do not claim that ALPA participated in TWA's alleged hiring discrimination.

Nor do they allege that ALPA refused to seek seniority modification on their behalf in bad faith or for arbitrary reasons unrelated to the bona fides of the neutral pilot seniority provisions. They do not allege that any of them tendered to ALPA proof that they were the victims of hiring discrimination, or even that any of them at any time made demand of ALPA to seek modification of their position on the pilot seniority roster to reflect their alleged "rightful place" on the seniority lists.

In this context it is apparent that plaintiffs' theory with regard to the duty of fair representation is that the carrier and the collective bargaining representative are obligated to reach out and on their own initiative modify a neutral date of hire seniority system so as to award pre-hire constructive seniority to specified minority pilots even before those employees have proved to a Court of competent jurisdiction that they were in fact victims of hiring discrimination. Moreover, the defendants' failure to take those steps would be a per se breach of fair representation regardless of their complete good faith of purpose. If this principle were the law, Franks v.

Bowman Transportation Co., which established the means by which victims of hiring discrimination may secure the remedy of constructive seniority, would have been superfluous.

Plaintiffs' allegations regarding the duty of fair representation do not embody the elements established for such claims. The duty of fair representation is not a phrase which exists in a vacuum, but rather exists subject to defined standards recognized by the Supreme Court and other federal courts. In Vaca v. Sipes, 386 U.S. 171, 190 (1967), the Supreme Court emphasized that "breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." The Court in Vaca expressly held that the standard is good faith on the union's part and the union may refuse to process even a meritorious grievance if its actions are in good faith, without breach of the duty of fair representation. 386 U.S. at 192-193. Here, in contrast to Vaca, plaintiffs have not contended that they tendered to the union a claim for relief which was the subject of refusal by the union.

In Motor Coach Employees v. Lockridge, 403 U.S. 274, 299-300 (1971), the Court spelled out the elements of denial of fair representation in further detail, holding that to establish this breach the employee must prove "'arbitrary or bad-faith conduct on the part of the Union,'" through "'substantial evidence of fraud, deceitful action or dishonest conduct.'" Specifically, the Court added, the doctrine of fair representation "carries with it the need to adduce substantial evidence of discrimination that is intentional, severe and unrelated to legitimate union objectives." 403 U.S. at 301 (emphasis added).

In Jackson v. TWA, 457 F.2d 202, 204 (2d Cir. 1972), this Court, applying the well established standard, said in part:

> "Something akin to factual malice is necessary to establish a breach of the duty of fair representation. Cunningham v. Erie Railroad Co., 266 F.2d 411, 417 (2 Cir. 1959). Absent a showing of 'hostile discrimination', there is no breach of the duty of fair representation merely because the negotiated agreement fails to satisfy all persons represented by the union. Steele, supra; Ford Motor Co. v. Huffman, 345 U.S. 330, 337-338, 73 S.Ct. 681, 97 L.Ed. 1048 (1953)."

Later in Jones v. TWA, 495 F.2d 790, 798 (2d Cir. 1974), the Court added, with respect to proving a breach of the duty of fair representation, that "[i]t is also sufficient that a distinction be arbitrary or not based on some rational consideration." See also, as to applicable standards, Nagel v. Teamsters Local 732, 396 F.Supp. 391, 393 (E.D.N.Y. 1975); Simpson v. NMU, _____ F.Supp. _____, 87 LRRM 3077, 3081 (S.D.N.Y. 1974).

Plaintiffs' second amended complaint, and particularly paragraphs 9.g. and 10, the only paragraphs embodying plaintiffs' fair representation claim (A. 34), does not set forth any of the material allegations which are mandatory elements of a valid fair representation claim, but contains only the bare conclusory allegation that defendants' conduct breached their duty of fair representation. However, as stated in Nagel v. Teamsters Local 732, supra, "The allegations of a complaint alleging a breach of a union's duty of fair representation must contain more than conclusory statements alleging improper representation; conclusory allegations without specifying supporting facts to show the union's lack of good faith fail to state a valid claim." 396 F.Supp. at 394, n. 2.

It is also clear that plaintiffs' failure to allege efforts by them to bring to the attention of their collective bargaining representative any claim for relief or any facts capable of supporting such a claim constitutes a further fatal defect in their complaint. The labor statutes impose "upon the exclusive bargaining representative only a duty of good faith representation, not a general duty of good care." Brough v. Steelworkers, 437 F.2d 748, 750 (1st Cir. 1971). "[M]ere negligence does not establish a breach of the duty of fair representation." Nagel v. Teamsters Local 732, supra, 396 F.Supp. at 394, n. 3, citing, Bazarte v. UTU, 429 F.2d 868, 872 (3 Cir. 1970); Encina v. Tony Lama Co., 316 F.Supp. 239 (W.D. Tex. 1970), aff'd., 448 F.2d 1264, 1265 (5th Cir. 1971). And "[m]ere failure by the [union] to protect [minority] employees from discriminatory corporation policies... is insufficient to establish liability." Williams v. General Foods Corp., 492 F.2d 399 (7th Cir. 1974).

In Conrad v. Delta Air Lines, Inc., 494 F.2d 914, 918-918 (7th Cir. 1974), the Seventh Circuit stated, in the context of dismissing a claim that ALPA denied fair representation to a pilot by failing to represent

him on his claim that the carrier discharged him for union activity,

> "[T]he complaint does not allege that he requested representation on his claim that the discharge was unlawful because motivated by his union activity. Of course ALPA became aware of that claim when plaintiff amended his complaint. There is no suggestion that the facts on which it was based were known to ALPA at any earlier time.
>
> ...[T]here is no allegation in the complaint that ALPA acted in bad faith in refusing representation, and the amendment added no such allegation. In the absence of a claim that he requested representation at that stage, it would seem extraordinary to impose on ALPA, a defendant in plaintiff's action, the duty of offering him representation on a new claim first discovered during the pendency of the action."

Here plaintiffs have not alleged that they placed upon ALPA a demand for assistance or tendered to ALPA facts capable of confirming that they occupy improper seniority positions. It would seem equally extraordinary to impose on ALPA the duty of demanding reformation of pilot seniority to locate plaintiffs in seniority positions which they did not demand and to which they have yet not proven themselves entitled. This is particularly apparent when one considers that the Supreme Court in Franks was

careful to warn that it was "not to be understood as holding that an award of seniority status is requisite in all circumstances." 96 S.Ct. at 1267. It is difficult to fathom how defendants may be liable to plaintiffs for breach of fair representation in respect of a claim for seniority relief which, for all that appears, was never presented to ALPA, was never made the subject of relevant proof provided to ALPA, and may never bear fruit in Court even if discrimination is proved, because the fashioning of appropriate remedies depends on the "equitable discretion of the district courts." Id.

Plaintiffs' claim (Br., p. 31) that ALPA was put on notice of the hiring discrimination which they allegedly suffered, by virtue of the "statistical data" as to the number of black TWA pilots employed from 1965 until 1970, is groundless. Plaintiffs ignore that they were in fact hired by TWA, including the hire of Whitehead in 1966. ALPA is not made party to hiring applications and could not know of prior applications by plaintiffs or the circumstances of their rejection. At bottom, plaintiffs' allegation amounts to the claim

that by implementing a neutral date-of-hire seniority system defendants breached their duty toward plaintiffs merely because the seniority provisions resulted in an alleged disproportionate furlough of minority employees.

We are aware of no cases which hold that implementation of a neutral date-of-hire seniority system in the circumstances of this case may constitute a breach of the duty of fair representation. Such a claim would be patently inconsistent with Title VII's anti-preference proviso, set out in the margin.*

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*Section 703(j), 42 U.S.C. §2000(e)-2(j) provides:

> "Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

It is also precisely the type of claim for preferential treatment of persons who were not victims of hiring discrimination which this Court in Acha v. Beame, supra, was so careful to rule out. 531 F.2d at 656; and 531 F.2d at 657 (Kaufman, C.J., concurring). See also Watkins v. Steelworkers, Local 2369, 516 F.2d 41 (5th Cir. 1975), reversing, 369 F.Supp. 1221 (E.D.La. 1973). There is no justification for holding that a statutory bargaining representative under the RLA must negotiate a seniority system resulting in preferential treatment for minority employees when Title VII so clearly eschews this form of obligation. ALPA was therefore under no notice from or obligation to plaintiffs stemming from the mere alleged fact that the TWA pilot seniority system has resulted in "disproportionate" furloughs of black TWA pilots.

Plaintiffs' claims as to the breach of fair representation founder as well on the utter reasonableness and objectivity of the neutral date of hire seniority system described in the complaint. Plaintiffs sought a different place in that system as a judicial remedy for hiring discrimination but did not challenge the validity of the system itself. Neutral date of hire seniority, far from reflecting arbitrary whim by the collective

bargaining representative, constitutes the best shield against arbitrary action from the employer or the union. "Seniority systems and the entitlements conferred by credits thereunder are of vast and increasing importance in the economic employment system of this Nation." Franks v. Bowman Transportation Co., supra, 96 S.Ct. at 1265. This is for good reason: in the perception of workers everywhere, comparative seniority rankings constitute the single most neutral, fairest and least arbitrary method of allocating "entitlements to scarce benefits among competing employees." Id. A union which attempted to replace the seniority system with some other unspecified form of allocation could invite dramatic industrial strife, widescale litigation of a scope far exceeding the present lawsuit, and probable decertification as bargaining representative.

"A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose." Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953). "Seniority rules governing promotions, transfers, layoffs

and similar matters may, in the first instance, revolve around length of competent service." Id. See also Humphrey v. Moore, 375 U.S. 335, 349-50 (1964). In the case of pilot employment, a seniority system based on length of competent service is patently fair and reasonable.* If, by alleging merely the implementation of a date-of-hire seniority system in which they assertedly do not occupy their "rightful place" because of carrier hiring discrimination, plaintiffs may state a claim under the RLA, there is no limit to the liability of a labor organization which has acted in good faith. Under Title VII, plaintiffs who file timely charges of hiring discrimination are not without a potential remedy; a bargaining representative's duty of fair representation is not intended as a surrogate for an employee's failure to pursue his claim of hiring discrimination through the procedures established by law.

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*Cases such as Steele v. Louisville & N.Ry., 323 U.S. 192 (1944) and its progeny, relied on by plaintiffs (Br., p. 31) are without application here. All involved claims or proof of overt and intentional racial discrimination practiced by the defending unions and carriers. No such allegations have been or could be made against ALPA.

CONCLUSION

For the above reasons, and those stated in the brief of defendant TWA, dismissal of the complaint should be affirmed.

Respectfully submitted,

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I certify that I have this 28th day of December 1976 served two copies of the within brief of defendant-appellee Air Line Pilots Association, International by first class mail upon each of the following counsel:

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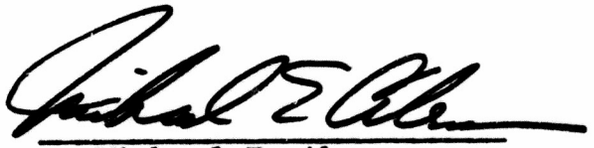

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December 28, 1976

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Re: Cates v. TWA and ALPA
No. 76-7420

Dear Mr. Fusaro:

Enclosed for filing are twenty-five (25) copies of the Brief of Defendant-Appellee Air Line Pilots Association, International together with a certificate of service.

Yours truly,

Michael E. Abram

MEA:sb
Enclosures